IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 724

BENARD SOUTH and HAROLD C. FLEMING
Plaintiffs-Appellants,

vs.

JAMES PETERS as Chairman of the GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: MRS. IRIS BLITCH, as Acting Secretary of the GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: THE GEORGIA STATE DEMOCRATIC PARTY: and BEN W. FORTSON, JR., Secretary of State of Georgia.
Defendants-Appellees.

Appeal From the District Court of the United States For The Northern District of Georgia Atlanta Division.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

HAMILTON DOUGLAS, JR.
Rhodes Haverty Building,
Atlanta, Georgia

MORRIS B. ABRAM,
Connally Building,
Atlanta, Georgia
Attorneys for Plaintiffs-Appellants

AFFIDAVIT OF SERVICE

Hamilton Douglas, Jr., being duly sworn, deposes and says that he is one of the Attorneys for Appellants in the above entitled cause, that he gave notice of Appellants' Brief in Opposition to Appellees' Motion to Dismiss or Affirm by depositing on April 4, 1950, in a United States Mail Box in the City of Atlanta a copy of said Brief addressed to each of the attorneys of record for Appellees.

Subscribed and sworn to before me by Hamilton Douglas, Jr., who is to me personally known, this 4th day of April, 1950.

Notary Public

SUBJECT INDEX

	Page
Table of Cases	iii
Preliminary Statement	1
I This Case Presents a Substantial Federal Question	2
II "Political Question" Not Involved	6
III Not a Suit against the State	11
IV Other County Unit Cases Not Applicable	14
Conclusion	15

TABLE OF CASES

	Page
Aetna Life Insurance Co. v. Haworth, 300 U.S. 227	9
Chapman v. King, 154 Fed. (2) 460, cert. den. 327 U.S. 800	5, 7
Chicago v. Fieldcrest Dairies, 316 U.S. 168	13
Colegrove v. Green, 328 U.S. 549	6, 7, 8, 9, 14
Cook v. Fortson, 68 F. Supp. 624, 329 U. S. 675	14
Ex parte Yarbrough, 110 U.S. 651	10
Ex parte Young, 209 U.S. 123	11
Fairchild v. Hughes, 258 U.S. 126	7
Giles v. Harris, 189 U.S. 475	8
Lane v. Wilson, 307 U.S. 268	8, 12
Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682; 93 L. ed. 1392	12
MacDougall v. Green, 335 U.S. 281	5, 6, 7
Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371	12
Minor v. Happersett, 21 Wall. 162	3
N. C. & St. L. Ry. v. Wallace, 288 U.S. 249	9
Newberry v. United States, 256 U.S. 232	10
Nixon v. Condon, 286 U.S. 73	4, 7
Nixon v. Herndon, 273 U.S. 536	3, 4, 7
Railroad Commissioners of Texas v. Pullman Co., 312 U.S. 496	13
Rice v. Elmore, 165 Fed. (2) 387, cert. den. 333 U.S. 875	6, 7, 8, 10
Richardson v. McChesney, 218 U.S. 487	11
Smiley v. Holm, 285 U.S. 355	6, 7
Smith v. Allwright, 321 U.S. 649	4, 5, 7, 10
Smyth v. Ames, 169 U.S. 466	11
Sterling v. Constantin, 287 U.S. 378	11
Truax v. Raich, 239 U.S. 33	11
Turman v. Duckworth, 68 F. Supp. 744, 329 U.S. 675	14
United States v. Classic, 313 U.S. 299	5
United States v. Moseley, 238 U.S. 383	3
United States v. Saylor, 322 U.S. 385	3

CONSTITUTIONS

	Page
Eleventh Amendment, United States Constitution	11
Fourteenth Amendment, Sec. 1, United States Constitution	2, 3, 4, 5
Fifteenth Amendment, United States Constitution	3
Seventeenth Amendment, United States Constitution	5

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 724

BENARD SOUTH and HAROLD C. FLEMING
Plaintiffs-Appellants,

vs.

JAMES PETERS as Chairman of the GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: MRS. IRIS BLITCH, as Acting Secretary of the GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: THE GEORGIA STATE DEMOCRATIC PARTY: and BEN W. FORTSON, JR., Secretary of State of Georgia.

Defendants-Appellees.

Appeal From the District Court of the United States For The Northern District of Georgia Atlanta Division.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

PRELIMINARY STATEMENT

Now come the Appellants and in conformity with Rule 7, of the Rules of the Supreme Court of the United States, file this their Brief in Opposition to Appellees' Motion to Dismiss or Affirm.

Jurisdiction of this Court

Matters making for the jurisdiction of this Court on Appeal have been stated in Appellants' Statement as to Jurisdiction heretofore filed.

Statement of the Case

The matters before this Court, including a statement of the case and a statement of the issues involved in this Appeal have been set forth in Appellants' Statement as to Jurisdiction heretofore filed.

I. THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION

Nature of the Injury

This is a disfranchisement case. Appellants are qualified voters whose ballots are not counted equally with other ballots cast for the same public officials.

Appellants complain that their right to cast ballots as qualified voters in the statewide Georgia Democratic Primary, the only meaningful statewide election in one-party Georgia since 1872, is being for all practical purposes destroyed by the County Unit System of vote consolidation.

This appeal presents grave and substantial federal questions:

May a State, required to treat all qualified voters equally as they register and vote, deliberately establish and operate a dilution scheme which effectively cancels and ignores the ballots of these Appellants by a system of vote consolidation?

Is it permissible State practice for defendants to water down Appellants' ballots so that other qualified voters will have in some cases 122 times, and on a statewide average 11.5 times, the voting strength of Appellants?

Is place of residence any more than altitude of residence a proper basis for diluting the ballots of some qualified voters and increasing the weight of others?

Does the Equal Protection Clause protect the franchise in the stages of registration, voting and counting of ballots, but leave to the uncontrolled discretion of state officials the *effective* counting of ballots?

The Georgia County Unit System is unique. This Court, so far as Appellants can discover, has never passed on the questions presented by this Appeal. But the underlying Consti-

tutional principles on which Appellants rely for relief are not new to this Court and were correctly applied by Judge M. Neil Andrews below.

Appellants complain that their valid ballots are being diluted and practically ignored by the equivalent of ballot box stuffing — legislative style. This ignoring and dilution of ballots by consistent legislative policy is no more defensible than the same conduct committed occasionally by dishonest election officials.

There can be no doubt that there is a federally-protected right not to have one's ballot ignored or diluted by sporadic dishonesty. In *United States v. Saylor*, 322 U. S. 385, this Court held that there was a Constitutionally-secured right not to have the value of one's ballot watered down by dishonest officials who stuffed the ballot boxes with ballots for candidates to whom complainants were opposed. See also *United States v. Moseley*, 238 U. S. 383.

The Substantive Law in This Case

The majority decision below apparently holds that the Fourteenth Amendment of itself contains no guarantee of equal protection of the franchise. In this holding reliance was placed on *Minor v. Happersett*, 21 Wall 162. The majority noted that in *Nixon v. Herndon*, 273 U. S. 536, this Court granted relief on the basis of the Fourteenth Amendment, and of it alone. But the majority opinion went on to say of the *Nixon* case, "*Minor v. Happersett* was not noticed and has not been overruled." (There was no need for Mr. Justice Holmes to notice, or for the Court to overrule, *Minor v. Happersett*. The decision there involved the Privileges and Immunities Clause and the Equal Protection Clause was not in issue. The Court in the *Nixon* case emphatically stated that it was unnecessary to apply the Fifteenth Amendment "because

it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth.")

This Court has consistently applied the Equal Protection Clause of the Fourteenth Amendment to many matters originally controlled by the States. So far as we can discover it has never been urged that the scope of equal protection excludes the franchise. Many decisions of this Court show that the Equal Protection Clause is a vital weapon in defense of the franchise.

Nixon v. Herndon, supra.
Nixon v. Condon, 286 U. S. 73
Smith v. Allwright, 321 U. S. 649

Appellees contend that the right to vote in a State primary election does not arise under the Constitution and laws of the United States, and seek to draw the conclusion therefrom that Appellants state no substantial federal question. While the original qualifications for voting are established under State law, State regulation of the franchise is subject to the requirements of equal protection. Once the State establishes the qualifications for voting, all persons within the established qualifications must be treated equally. A voter is either qualified or he is not — if qualified, the State cannot discriminate as to him. We do not understand that the cases cited by Appellees hold to the contrary.

Nor do we understand it to be allowable state practice to set up discriminatory classifications, arising out of hostility and prejudice, which stifle the voice of voters in urban areas, deprive progressives in the cities of a fair share in the government, kill the labor vote, and disfranchise the Negro in those places where he is allowed to vote in any important numbers.

No case cited by Appellees presents the issue of deliberate dilution of a voter's ballot after it is cast and counted, nor do

any of the cases cited show a discrimination of the type and degree here presented. For example, *MacDougall v. Green*, 335 U. S. 281, which dealt with the direction from which political *initiative* might be required to come, held only that the State was entitled to regard the slight degree of discrimination there complained of as "not disproportionate."

The Seventeenth Amendment

In addition to the issues raised under the 14th Amendment, this case presents to the Court an issue of first impression relating to the 17th Amendment which guarantees that United States Senators shall be elected by the people of the States.

Appellants complained below that vote consolidation by county units deprived them of their rights under the 17th Amendment. Judge Andrews thought the County Unit System "may be a direct violation of the Seventeenth Amendment which guarantees election of Senators by the people." He further held: "The constitutional power of the Senate to exclude the chosen one has no bearing on the individual's right to have his vote counted properly."

This appeal also presents the question of the violation of Appellants' claimed privilege and immunity to have their votes counted equally for a United States Senator, after Appellants have been qualified by the State as voters.

The Effect of a Primary

Since *United States v. Classic*, 313 U. S. 299, *Smith v. Allwright* 321 U. S. 649 and *Chapman v. King*, 154 Fed (2) 460, there can be no doubt that the denial of Appellants' right of franchise in a Georgia Democratic Primary is a violation of a federally protected right.

II "POLITICAL QUESTION" NOT INVOLVED

The Issue Is Justiciable

Appellees rely solely upon *Colegrove v. Green*, 328 U. S. 549, as authority for their contention that the case at bar is nonjusticiable. Yet the *Colegrove* case was decided by seven justices, four of whom very clearly held the issues there to be *justiciable and not political*. See also *Smiley v. Holm*, 285 U. S. 355; *MacDougall v. Green*, 335 U. S. 281; *Rice v. Elmore*, 165 Fed. (2) 387, cert. den. 333 U. S. 875.

Moreover the issues in the *Colegrove* case are markedly different from the issues involved here, so that the opinion of the three justices who found the *Colegrove* issues political is not applicable here. Judge Andrews, in his dissent below, clearly demonstrates the vital distinction between the two situations:

> "There is no question here of interference with Congress in its power to control the manner of holding elections. There is no necessity for this Court to remap the State politically, nor for the Georgia General Assembly to take any action. There is no problem here of individuals seeking to right a wrong to the State as a polity. Plaintiffs do not complain of any wrong done their county, nor do they seek remedy for the unequal representation accorded their county in the General Assembly. They ask only that their votes be valued equally with other votes cast for the same offices."

The argument advanced by the appellees that only a few county unit nominees have failed to receive a popular plurality, and that Appellants have not proved that the candidates for whom they will vote will be defeated by the county unit device, is entirely irrelevant. Appellants are being denied a personal voting right which is theirs regardless of the fate of the candidates for whom they vote.

Smith v. Allwright, 321 U. S. 649.
Nixon v. Herndon, 273 U. S. 536.
Nixon v. Condon, 286 U. S. 73.
Chapman v. King, 154 Fed. (2) 460.
Rice v. Elmore, supra.

Those cases which have held that an individual cannot right a wrong done the community at large (*Fairchild v. Hughes*, 258 U. S. 126, is typical) go upon the premise that a citizen may not, simply because of his citizenship, bring in issue general questions of "bad government" unless he has suffered damage personal to himself. What can be more peculiarly personal than the right to vote in equality with other qualified voters? Appellants do not share their right to vote in common with other citizens, no matter how many others are victims of similar inequities. Appellants' right to vote in equality is a personal right to be exercised by each alone, and abridgement of that right is, and should be, actionable.

Equity Will Enforce Voting Rights

Appellees' contention that "equity is without jurisdiction to enforce a purely political right" ignores decided cases.

Colegrove v. Green, supra.
Smiley v. Holm, supra.
Rice v. Elmore, supra.
MacDougall v. Green, supra.

In two of these cases (*Smiley v. Holm* and *Rice v. Elmore*) injunctive relief was afforded the individual voter. In the *MacDougall* case, the relief requested was denied on the substantive issues raised, strongly inferring the basic rights of equity to enforce voting rights in a proper case. In the *Colegrove* case, four of seven justices found no fundamental want of equity, though one of the four joined in a denial of injunc-

tion as a matter of discretion because of the practical consequences of a decree in that particular case.

The proper doctrine to be drawn from these cases is that equity will afford relief for voting wrongs, but will withhold a decree when, in the Court's discretion, the "cure may be worse than the disease". *Giles v. Harris*, 189 U. S. 475, upon which Appellees rely, has been thus interpreted in *Lane v. Wilson*, 307 U. S. 268, and *Colegrove v. Green, supra*, Dissent. In the *Giles* case the decree would have required continued supervision by the Court of the electoral process.

Because of the unique nature of the County Unit System (47 states do not use it), injunctive relief can be afforded without disrupting the pending primary or the political fabric of the State, and without detailed supervision by the Court, as Judge Andrews makes clear in his dissent below:

> "I am unable to find any unpalatable practical consequences to the granting of injunction in this case. There will be no necessity for this Court to supervise any election, an eventuality upon which *Giles v. Harris*, (*supra*), turned. The gross discrimination wrought by the offending statute occurs after the votes have been cast and counted by a method employed by the State Democratic Executive Committee and its chairman and secretary. The effective application of the discrimination to the plaintiffs occurs when the nominees are placed on the general election ballot by the Secretary of State. All of these instruments of discrimination are defendants here and an injunction forbidding their actions under the offending statute will effectively end the discrimination. The relief granted in *Rice v. Elmore, supra*, required of the Court vastly greater supervision of the electoral process than is asked or required in this case.
>
> "Granting of injunctive relief will not bring about any of the practical consequences feared by the Court in *Cole-*

grove v. Green, supra. No disruption of a pending election will ensue. The only change which will be effected is the method of consolidating the vote at the top level of the Georgia Democratic Party. The votes will be cast and counted in precinct, ward and county without change or interruption. The Georgia General Assembly need take no action to provide an alternative method of determining nominees, for under Georgia law the responsibility will revert to the party."

Declaration Is Appropriate Without Injunction

While a request for declaratory relief does not enlarge the Court's jurisdiction of the subject matter, a declaration is nevertheless appropriate where the issues are justiciable, even though the Court in its discretion refuses to decree an injunction.

N. C. & St. L. Ry. v. Wallace, 288 U. S. 249.
Aetna Life Insurance Co. v. Haworth, 300 U. S. 227

Certainly no declaration can issue where the controversy is not a proper one for exercise of the judicial power, as was pointed out by Mr. Justice Frankfurter in *Colegrove v. Green, supra:*

> "And so, the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy would be justiciable in this Court if presented in a suit for injunction."

But where the controversy is justiciable, the fact that some of the essential criteria for equitable relief *as such* is lacking (for example, where there is an adequate remedy at law), the right to a declaration will be unaffected. Even though the Court might find some discretionary reason, not perceivable to Appellants, for denying injunction, Appellants would nevertheless be entitled to a declaration if the issues are, as we contend, basically justiciable.

Qualifications of Voters Are Judicial Matters

Appellees contend that the power of the United States Senate to judge the qualifications of its members excludes the judiciary from judging the treatment accorded electors who vote in Senatorial contests, and that the Congressional and state legislative control over the "manner" of holding elections for federal officials enforces a like exclusion upon the courts. Such contention would invalidate every decision in the long line of voters' rights cases from *Ex parte Yarbrough*, 110 U. S. 651, to *Rice v. Elmore, supra.*

The Senate may of course reject any applicant for a seat, in its uncontrolled discretion. It may reject Senators elected by the device of allowing Negroes to vote in primary elections, a right secured by the federal courts. *Smith v. Allwright, supra.* It may refuse to seat Senators from the 47 states which elect by popular vote. But this power to reject the chosen one does not remove from the federal courts their duty to enforce the Constitutional guarantees of individual rights. And that the "manner" of holding elections does not include exclusive control over the rights of electors, see *Newberry v. United States*, 256 U. S. 232, 257.

III NOT A SUIT AGAINST THE STATE

No one would deny, since the Eleventh Amendment to the Constitution of the United States was adopted, that a State may not be sued without its consent. We would not have supposed, until the Appellees raised the point, that anyone would have denied that a State official purporting to act under color of an unconstitutional State statute is personally subject to restraint by the federal courts.

Smyth v. Ames, 169 U. S. 466.
Ex parte Young, 209 U. S. 123
Richardson v. McChesney, 218 U. S. 487.
Truax v. Raich, 239 U. S. 33
Sterling v. Constantin, 287 U. S. 378.

In *Richardson v. McChesney, supra*, the Court considered a case similar to the one at bar, where injunction was sought to prevent the Secretary of State from holding an election under an allegedly invalid statute. Mootness prevented a decision on the merits, but the Court held that the suit was not against the State.

In the case of *Ex parte Young, supra*, the Court dealt with a situation closely analogous to the case at bar, in that the plaintiff sought to enjoin a state official from performing an act which put into operation an invalid law, though the statute under which the official was acting was itself perfectly valid. On page 157, the Court said:

> "In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act . . .
>
> "It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced . . . The fact that the state officer, by virtue of his office, *has some connection with the enforcement of*

the Act, is the important and material fact, and whether it arises out of the general law, or is specifically created by the act itself, is not material so long as it exists." (emphasis supplied).

The cases cited by Appellees in support of their contention clearly recognize the rule we contend for. In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682; 93 L. ed. 1392, the Court recognized that a suit for specific relief against a public official is not a suit against the sovereign where the suit is directed against action which the official purports to take under a statute claimed to be unconstitutional. On page 1397 (93 L. ed.) the Court said:

> "Here, too, the conduct against which specific relief is sought is beyond the officer's power and is, therefore, not the conduct of the Sovereign."

In *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371, the relief sought would have stopped the defendant "from taking certain action which would stop payment by the government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the Appellant." The case is thus clearly different from the case at bar and no authority for Appellees' contention.

Federal Court Proper Forum for this Controversy

The case at bar presents issues, the solution of which is purely judicial. Whether or not a remedy is available to Appellants in the State courts, in a case of this nature federally-secured rights are equally enforceable in a federal forum. No administrative functions are delegated to the Georgia courts by the statute under attack, nor is there any incompleteness in legislative process which must first be completed by the State courts before resort to the federal courts. As Mr. Justice Frankfurter put it in *Lane v. Wilson*, 307 U. S. 268, 274:

"To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had . . . But the state procedure open for one in the plaintiff's situation has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies . . . Barring only exceptional circumstances, . . . or explicit statutory requirements, . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts."

We do not understand *Railroad Commissioners of Texas v. Pullman Co.*, 312 U. S. 496, or *Chicago v. Fieldcrest Dairies*, 316 U. S. 168, relied on by Appellees, to hold otherwise.

IV. OTHER COUNTY UNIT CASES NOT APPLICABLE

Appellees place reliance upon other cases which involved the unique Georgia County Unit System. These two cases, *Turman v. Duckworth*, 68 F. Supp. 744, 329 U. S. 675, and *Cook v. Fortson*, 68 F. Supp. 624, 329 U. S. 675, were companion cases based upon a completed primary election.

This Court has never passed on the merits of the Georgia County Unit System, since the dismissal in the *Turman* and *Cook* cases were solely on grounds of mootness. By the time the cases reached this Court, the only remedy available would have required the Court to completely upset the political machinery of Georgia, since the time for placing nominees on the General Election ballot had passed.

The District Court decisions in these earlier cases also are inapplicable. Denial of relief was based upon *Colegrove v. Green*, *supra*, presumably as an exercise of the Court's discretion to deny relief under the facts before it.

The facts were these: Plaintiffs there sought to overturn a completed primary election after voting in the primary without complaint. Though the defeated candidates did not complain, plaintiffs asserted that the candidates they supported were popular vote victors but county unit losers.

We submit that the District Court properly exercised its discretion in refusing to overturn a completed primary election at the request of voters who had balloted without complaint. We further submit that these cases are no bar to the relief Appellants request here, the prior protection of their personal right to vote in equality with all other voters for officials who will govern Appellants and those others alike.

CONCLUSION

We have sought to demonstrate in this Brief in Opposition to Appellees' Motion to Dismiss or Affirm, the entire absence of any basis upon which a dismissal or affirmance could be granted.

We again call to the Court's attention the lucid and penetrating dissent filed by Judge M. Neil Andrews in the District Court below, included as Appendix "F" to Appellants' Statement as to Jurisdiction.

And in conclusion we respectfully request the Court to overrule Appellees' Motion to Dismiss or Affirm so that this case may be set down for an early hearing on its merits.

Respectfully submitted,

HAMILTON DOUGLAS, JR.
1414 Rhodes-Haverty Bldg.
Atlanta, Georgia.

MORRIS B. ABRAM
512 Connally Bldg.
Atlanta, Georgia
Attorneys for Plaintiffs-Appellants.